No. 89-378

In the Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF ALABAMA, EX REL. DON SIEGELMAN, ATTORNEY GENERAL OF ALABAMA, ET AL., PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a citizen of Alabama had standing to challenge the failure of the EPA to give him or the State of Alabama notice of a decision to utilize off-site disposal of wastes as part of a cleanup taking place in Texas under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), because the contractor selected by the State of Texas to perform the cleanup elected to ship the wastes to a licensed facility in Alabama.

2. Whether Section 113(h) of CERCLA, 42 U.S.C. 9613(h) (Supp. V 1987), bars a challenge to a decision to use a particular method of disposal at a site until after the remedial action at the site is completed, and, if so, whether such deferral of review denies due process of law.

3. Whether the court of appeals properly dismissed petitioners' challenge to the district court's imposition of a bond.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 38a-92a) is reported at 871 F.2d 1548. The opinions of the district court granting a temporary restraining order (Pet. App. 1a-21a), a preliminary injunction (Pet. App. 22a-25a), and partial summary judgment (Pet. App. 26a-37a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 18, 1989. A petition for rehearing was denied on June 7, 1989. The petition for a writ of certiorari was filed on September 1, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Geneva Industries site, located in Houston, Texas, is an abandoned refinery which manufactured a variety of organic compounds, including polychlorinated biphenyls (PCBs), from 1967 through 1978. Plant operations were marked by numerous spills of PCBs; after investigation, EPA concluded that the PCB contamination of the site presented a continuing risk to persons living around it. ROD 1-10.[1] After considering comments submitted in response to a rulemaking proceeding on potential hazards associated with the site, EPA added the Geneva Industries site to the National Priorities List (NPL) of sites that appear to warrant remedial action under CERCLA (49 Fed. Reg. 37,083 (1984)); the site is currently assigned a priority ranking of 37 out of approximately 800 NPL sites. 40 CFR Pt. 300, App. B.

In January of 1984, EPA entered into a cooperative agreement with the Texas Water Commission (TWC) under which the TWC would be the lead agency for CERCLA actions at the Geneva site. The TWC performed a Remedial Investigation of the site, and then conducted a Feasibility Study in order to determine what actions would be appropriate as part of a permanent remedy. Pet. App. 42a-43a. The Feasibility Study, which described alternative environmentally safe procedures for cleanup (including groundwater treatment and the excavation and disposal of contaminated soils), was released for public review and comment in May 1986. Three options for disposal were put before the public for comment: on-site incineration, off-site incineration, and off-site land disposal. During the public comment period, which lasted from May 3 through

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[1] We are lodging a copy of the Record of Decision (ROD) with the Clerk of this Court.

June 10, 1986, EPA held a public meeting in South Houston. *Id.* at 43a, ROD 20.

After evaluating the merits of the various alternatives for disposal of the excavated soils and considering the public comments, EPA issued the Record of Decision (ROD) for the Geneva site on September 18, 1986. The ROD explained EPA's determination that the disposal option of off-site land disposal was the most cost effective of the various acceptble disposal options. In accordance with EPA's usual practice, no specific disposal facility was identified or selected in the ROD for the Geneva site. Pet. App. 43a, 51a-52a; ROD 21.

In November 1987, TWC solicited bids for the removal of PCB solids from the Geneva site. In compliance with federal procurement guidelines, 40 C.F.R. 33.205-33.605, Subpt. B, TWC selected the lowest responsive and responsible bid—the one submitted by Chemical Waste Management, Inc. (CWM). As part of its cleanup activities, CWM proposed to use its federally and state approved toxic waste treatment facility in Emelle, Alabama, to receive the excavated soils. In a May 24, 1988, press release, TWC announced that CWM was the cleanup contractor and had authorization to begin cleanup and disposal operations. Attachments to Federal Defendant's Opposition, Civ. Action No. 88-V-987-N (Defendant's Opp.), at Attachment 7; Pet. App. 51a-52a.

Although no special notice that CWM planned to use its Emelle facility was given to Alabama at this time, EPA did consult with the State before the contaminated soil was sent to the Emelle facility. Governor Guy Hunt and petitioner Attorney General Siegelman informed EPA of their concerns in correspondence of June and July 1988; in addition, on July 8, 1988, Siegelman sent EPA a notice of intent to sue. Defendant's Opp., at Attachment 2. Nevertheless, after meeting with Alabama officials the EPA Administrator concluded on August 5, 1988, that the remedy had been prop-

erly selected and that the Emelle waste treatment facility was an appropriate disposal site for the Geneva Industries contaminated soil. Pet. App. 52a-53a. On September 29, 1988, EPA notified Alabama that the shipments would begin in early October (*id.* at 6a).

On September 28, 1988, the complaint in this action was filed on behalf of the State of Alabama and individual plaintiffs Hunt, Siegelman and Pegues (the Director of the Alabama Department of Environmental Management).[2] It alleged that EPA had failed to perform nondiscretionary duties to consult with Alabama before deciding on a remedy at the Geneva site and to choose a remedy for the Geneva site other than off-site disposal. The complaint did not allege that wastes from the Geneva site differ in any respect from other wastes regularly disposed of at Emelle by CWM, or that disposal of the Geneva wastes at Emelle would cause environmental harm. It claimed instead that "[t]he availability of Alabama's existing hazardous waste landfill capacity, required for use by this State for the present and future disposal of its own waste, will be restricted and diminished," and that "[t]he time, energy and resources of Alabama State agencies and employees responsible for the protection of Alabama's environment will be diverted and broadened" if the Geneva site waste is shipped to Emelle. Complaint 13.

The district court granted petitioners' motion for a temporary restraining order prohibiting transportation of the Geneva site wastes (Pet. App. 1a). The court rejected arguments by EPA and intervenors Texas and CWM that Section 113(h) of CERCLA, 42 U.S.C. 9613(h), precluded review of this challenge to a remedial action under that statute (Pet. App. 12a-13a). The court held that Alabama was an "affected State" entitled to consultation before EPA "determin[es] any appropriate remedial action to be taken," within the terms of CERCLA Section 104(c)(2), 42 U.S.C.

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[2] Jurisdiction was asserted under, inter alia, the citizen suit provision of CERCLA, Section 310, 42 U.S.C. 9659 (Supp. V 1987).

9604(c)(2) (Pet. App. 10a-11a). The court also ruled that petitioners had been denied their constitutional right to due process of law because no specific notice or opportunity to be heard was provided them prior to issuance of the September 18, 1986, ROD on the Geneva site (*id.* at 17a).

Based on its earlier opinion, the district court subsequently entered a preliminary injunction enjoining EPA and "all persons in active concert or participation with [EPA]" from authorizing, engaging in, or funding the remedial action set out in the Geneva site ROD, or facilitating the transportation of Geneva site waste to Alabama (Pet. App. 22a-24a). The order required petitioners to post bond for security in the amount of $564,970.00, for any costs and damages proximately resulting from any wrongful restraint or injunction (*id.* at 20a, 25a). The court thereafter granted partial summary judgment to petitioners; it granted their request for a permanent injunction and ordered EPA to reopen its ROD for the Geneva site. The district court then dismissed the remainder of the case (*id.* at 26a-29a).

On appeal by respondents, the court of appeals reversed the grant of partial summary judgment, dissolved the injunction and dismissed the case for lack of subject matter jurisdiction (Pet. App. 91a). Petitioners' challenge to the bond requirement was dismissed as moot (*ibid.*).

The court of appeals first held that the State lacked standing to raise the due process challenge, since States are not persons within the meaning of the Fifth Amendment (Pet. App. 59a, citing *South Carolina* v. *Katzenbach*, 383 U.S. 301, 323 (1966)). It ruled that the individual petitioners also lacked standing to raise the constitutional issue because they had not suffered any specific injury resulting from their lack of participation in the development of the Geneva Industries ROD (Pet. App. 66a-68a).

The court of appeals next held that the district court had no jurisdiction over the claimed statutory violations because

Section 113(h) of CERCLA withholds jurisdiction to review challenges to a CERCLA remedial action until after the action is "taken" or "secured," and in this case the remedial action at the Geneva site was not yet completed (Pet. App. 73a-84a). In addition, the court of appeals considered the merits of petitioners' statutory claims and found that they rested on incorrect readings of CERCLA (*id.* at 84a-87a). In particular, the court concluded that Alabama was not an "affected State" for purposes of Section 104(c)(2) (requiring consultation before determination of remedial action), and that the individual plaintiffs were not "affected persons" within the meaning of Section 113(k)(2)(B), because EPA only chose the type of remedy—it did not decide where the wastes would ultimately be buried.

A timely petition for rehearing was denied on June 7, 1989, and the mandate issued that same day. Petitioners' motion to recall the mandate was denied by the court of appeals on July 25, 1989.[3]

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[3] Petitioners made no further effort to enjoin the shipment of wastes from the Geneva site to the Emelle facility. Shipments commenced in July of this year, we are informed by EPA that this phase of the remedial action at the Geneva site has now been completed. The request for injunctive relief against EPA's support of these shipments is accordingly now moot. The case as a whole can thus be saved from mootness only by the remaining possibility of recovery on the bond required in connection with the issuance of the preliminary injunction, which survived the appellate court's dissolution of the premanent injunction issued by the district court. Cf. *University of Texas* v. *Camenisch*, 451 U.S. 390, 396 (1981) (noting that issues preserved by injunctive bond do not survive when case is mooted on appeal of a preliminary injunction, but do survive when mootness occurs on appeal from issuance of final injunction, and distinguishing *Liner* v. *Jafco, Inc.*, 375 U.S. 301, 305-306 (1964), as involving a permanent, rather than a preliminary, injunction).

In any event, the case was not moot when it was decided by the court of appeals. For that reason, and because—as we explain below—there

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

1. The court of appeals ruled that neither Alabama nor the individual plaintiffs had standing to claim that it was unconstitutional for EPA to decide on a remedy for the Geneva site without first providing them with specific notice and an opportunity to comment. Petitioners tacitly concede (Pet. 16 n.2) that petitioner Alabama lacks standing (see *South Carolina* v. *Katzenbach*, 383 U.S. 301, 323 (1966)); petitioner Don Siegelman simply challenges the court's ruling that the individual plaintiffs lack standing. The ruling below is clearly correct, however, since the three individual plaintiffs failed to allege that they were personally threatened with any concrete injury; they alleged instead only generalized grievances regarding the conduct of a government program.

As the court of appeals pointed out, the individual plaintiffs failed to show that they "personally [have] suffered some actual or threatened injury" (Pet. App. 62a, quoting *Gladstone Realtors* v. *Village of Bellwood*, 441 U.S. 91, 99 (1979)), and also failed to show that any purported injury to them resulted from EPA's failure to give specific notice to Alabama (Pet. App. 66a).[4] The injury claimed by peti-

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are no reasons that would in any circumstances warrant further review of that decision by this Court, certiorari should be denied regardless of whether the case is now moot. Compare *Velsicol Chemical Corp.* v. *United States*, 435 U.S. 942 (1978), with *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950). See R. Stern, E. Gressman, & S. Shapiro, *Supreme Court Practice* 288, 722-723 & n. 28 (6th ed 1986).

[4] It is, in any event, far from clear that petitioner Siegelman has standing to object to the failure to give notice to the State. Instead, his claim would appear to be limited to the failure to give him notice as an individual citizen of the State.

tioner Siegelman is to an alleged "quantifiable property interest in the use and enjoyment of * * * state resources," specifically "state revenues," and "the safety, integrity, and conditions of Alabama's highways," landfill capacity within Alabama, and the "time and energy" of state employees (Pet. 18-20). But Siegelman has never attempted to show that he *personally* suffered some injury as a result of EPA's conduct (*Valley Forge Christian College* v. *Americans United For Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982)) or that he has any kind of "direct stake in the outcome," (*Sierra Club* v. *Morton*, 405 U.S. 727, 740 (1972)). Neither Siegelman nor the other individual plaintiffs alleged that they would be "affected in any of their activities or pastimes" by the shipment of wastes to the Emelle facility, or that they used the area around the facility or the highways leading to it "in any way that would be significantly affected by the proposed actions" (*Sierra Club*, 405 U.S. at 735). Siegelman's concern that EPA's actions will result in the expenditure of state resources and the use of state highways is one shared by all citizens of Alabama, and indeed by citizens of all States in which there are facilities that might have become the recipient of the Geneva site wastes. Petitioner Siegelman's generalized interest that EPA not violate the Fifth Amendment does not provide " 'that concrete adverseness . . . upon which the court so largely depends for illumination of difficult constitutional questions.' " *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 224 (1974) (quoting *Baker* v. *Carr*, 369 U.S. 186, 204 (1962)). The court of appeals was accordingly correct in finding that standing was lacking.

Even if Siegelman had pleaded a concrete injury, the causal link with the allegedly illegal agency action is too attenuated to support standing, as the court of appeals also found (Pet. App. 66a-68a). As the court noted (*ibid.*), petitioners did not challenge TWC's award of the contract to

CWM, nor did they challenge CWM's right to continue to dispose of PCBs at its Emelle facility pursuant to both state and federal approvals. Siegelman's "injury," therefore, is not fairly traceable to *EPA's* allegedly improper conduct since waste may continue to be shipped from Texas to Emelle even without EPA participation. See *Simon* v. *Eastern Kentucy Welfare Rights Org.*, 426 U.S. 26, 38 (1976).

2. Both petitioners contest the court of appeals' holding that Section 113(h) of CERCLA, 42 U.S.C. 9613(h), bars their statutory claims until the remedial action at the Geneva site is complete. That Section was added to the statute by the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613, and essentially codified a line of decisions holding that judicial review of EPA response actions under CERCLA is barred until after the a cleanup is completed. See *Dickerson* v. *Administrator, EPA*, 834 F.2d 974, 977-978 (11th Cir. 1987); *Solid State Circuits, Inc.* v. *EPA*, 812 F.2d 383 (8th Cir. 1987); *Wagner Seed Co. v. Daggett*, 800 F.2d 310 (2d Cir. 1986); *United States* v. *Outboard Marine Corp.*, 789 F.2d 497, 505-506 (7th Cir.), cert. denied, 479 U.S. 961 (1986); *Wheaton Industries* v. *EPA*, 781 F.2d 354 (3d Cir. 1986); *Lone Pine Steering Committee* v. *EPA*, 777 F.2d 882, 886-887 (3d Cir. 1985), cert. denied, 476 U.S. 1115 (1986); *J.V. Peters & Co.* v. *EPA*, 767 F.2d 263 (6th Cir. 1985). Section 113(h) bars federal court jurisdiction over "any challenges to removal or remedial action selected," and goes on to authorize jurisdiction in several limited instances, including where a citizen suit alleges "that the removal or remedial action taken under section 9604 of this title or secured under section 9606 of this title was in violation of any requirement of this chapter." As the court below noted (Pet. App. 75a-77a), the plain language of this provision, as well as its clear legislative history, compels the conclusion that judicial review must be deferred until after the

remedial action in question has been "taken" or "secured." As the court below also pointed out (*id.* at 83a-84a), petitioners cannot escape the force of this provision by claiming that their suit is not a challenge to a remedial action. Their complaint specifically asked the district court to void EPA's remedy decision for the Geneva site and require EPA to reopen the matter for further consideration after consultation with Alabama (*id.* at 84a).

Petitioners contend (Pet. 30-34) that Section 113(h) should apply only to plaintiffs who are attempting to litigate their liability for the costs of cleanup, not to plaintiffs who challenge a cleanup in order to prevent environmental harm. That argument finds no support in the language of the statute, which defers "any challenges" to remedial actions. Further, the argument is specifically refuted by the legislative history. See, *e.g.*, 132 Cong. Rec. H9583 (daily ed. Oct. 8, 1986) ("[c]learly the conferees did not intend to allow any plaintiff, whether the neighbor who is unhappy about the construction of a toxic waste incinerator in the neighborhood, or the potentially responsible party who will have to pay for its construction, to stop a cleanup by what would undoubtedly be a prolonged legal battle") (remarks of Rep. Glickman). Petitioners rely on dicta in a single district court opinion. *Cabot Corp.* v. *EPA*, 677 F. Supp. 823, 829 n.6 (E.D. Pa. 1988).[5] Subsequent cases have rejected the *Cabot* court's suggestion that Section 113(h) might not apply to citizen suits alleging irreparable harm, recognizing that the suggestion is inconsistent with Congress's intent to defer

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[5] *Chemical Waste Management, Inc.* v. *EPA*, 673 F. Supp. 1043 (D. Kan. 1987), also cited by petitioners (Pet. 33), did not involve a challenge to a remedial action. See, *e.g.*, 673 F. Supp. at 1055 ("[b]ecause plaintiffs are not attempting to delay a cleanup, the court believes that their legal action is expressly preserved"). See *South Macomb Disposal Authority* v. *EPA*, 681 F. Supp. 1244, 1249 n.4 (E.D. Mich. 1988) (distinguishing *Chemical Waste Management*).

all suits which could delay CERCLA cleanup actions. *Neighborhood Toxic Cleanup Emergency* v. *Reilly*, 716 F. Supp. 828, 832-834 (D. N.J. 1989); *Frey* v. *EPA*, 28 Env't Rep. Cas. (BNA) 1660, 1664 (S.D. Ind. 1988); see also *Jefferson County* v. *United States*, 644 F. Supp. 178, 181-182 (E.D. Mo. 1986) (pre-SARA case finding that challenges to CERCLA remedial actions by citizens alleging irreparable harm are barred); see generally *In re Combustion Equipment Assocs., Inc.*, 838 F.2d 35, 37 (2d Cir. 1988) ("Congress amended CERCLA in 1986 to make clear that the statute precluded preenforcement judicial review"); *Dickerson* v. *Administrator*, 834 F.2d 974, 978 (11th Cir. 1987) ("[Section 113(h)] reflects Congress' intent to preclude preenforcement judicial review and is consistent with earlier cases barring such review.").

In any event, the court of appeals specifically addressed the merits of petitioners' claims and found (Pet. App. 84a-87a) that EPA had complied with the statute. Petitioners do not quarrel with this alternative holding. Thus, even if the court below misread the scope of Section 113(h), the judgment would have to be affirmed on this alternative ground.

Petitioners' suggestion (Pet. 34) that Section 113(h) may be unconstitutional insofar as it "preclude[s] judicial review of legitimate constitutional claims" is unwarranted. First, as shown pp. 7-9, *supra*, petitioners lacked standing to bring their constitutional claim. In any event, Section 113(h) does not preclude review, but only delays it until after remedial action has been taken, and thus is clearly constitutional. See *South Macomb Disposal Authority* v. *EPA*, 681 F. Supp. 1244, 1251-1252 (E.D. Mich. 1988).

3. In the district court, Texas and CWM, as well as EPA, requested that petitioners be required to post a bond. The district court required petitioners to post a bond in the amount of $564,970, without specifying whether the bond

ran in favor of Texas and CWM in addition to EPA (Pet. App. 25a). Petitioners' cross-appeal assumed that the bond ran in favor of Texas and CWM, and argued that this was improper because those parties (unlike EPA) were not specifically enjoined by the preliminary injunction. Respondents pointed out, inter alia, that the issue was not ripe; whether or not the bond runs in favor of Texas and CWM, and if so whether that is proper, can be sorted out if and when there is an effort to collect on the bond. The court of appeals stated, without explanation, that petitioners' challenge to the bond requirement was "moot" (*id.* at 91a). Perhaps the court of appeals meant that the challenge was premature, but used the wrong label. It nevertheless seems clear that petitioners would not be barred from making their argument should Texas or CWM proceed against them. That appears to be all that petitioners are seeking at this point (Pet. 36). Since it is, in any event, speculative whether that question will arise in further proceedings, and how it will be resolved if it does, it is not suitable for presentation to this Court at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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